This letter constitutes the comments of the Northwest Pulp and Paper Association (NWPPA) on the draft document titled The Industrial Stormwater General Permit - "A National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated with Industrial Activities," (March 2002).

NWPPA supports and incorporates by reference the comments of the Association of Washington Business and those of NWPPA members such as Weyerhaeuser. Many of these other comments are quite detailed in addressing the many complex aspects of the draft Industrial Stormwater General Permit; hence NWPPA comments will address only a few key policy issues: (A) Condition S3D Stormwater Discharges to Impaired Water and (B) Condition S3E Mixing Zone Descriptions.

By way of general comment, NWPPA believes the following principles should guide these two sections:

- The draft industrial stormwater permit should be consistent with state and federal laws and regulations and, where appropriate, "available" guidance. Available guidance would be adopted policies that can be readily accessed by concerned individuals.
- Where regulatory provisions are referenced, the draft permit should utilize the exact language of the applicable state regulation instead of paraphrasing, in order to avoid future problems of confusion and discrepancies of interpretation.
- The draft industrial stormwater permit should be prepared in recognition that the TMDL program will be the best vehicle for setting limits or allocations for discharges of pollutants for which a water may be listed as impaired or not meeting water quality standards.

Condition S3D – Stormwater Discharges to Impaired Water

Comment 1 (S3D1)

NWPPA acknowledges that the draft permit makes a special accommodation for temperature discharges. Except for temperature, permittees must comply with the State's water quality standards for each pollutant named as a pollutant causing a violation of water quality standards at the location named on the 303(d) list. This is helpful because temperature problems usually occur during low flows which correspond to reduced rainfall in the summer; whereas stormwater discharges typically peak in the winter months.

Comment 2 (S3d2)

NWPPA disagrees with the following language:

> "Existing facilities that discharge to waters listed as impaired by the State under Section 303(d) of the Clean Water Act must comply with the State's water quality standards for the named pollutant(s) at the point of discharge."

This provision is neither legally nor technically necessary as a blanket requirement. If such an approach is needed, this should be determined on a case-by-case basis.

1. Not Technically Needed

In the only legal case to address this matter, the California Water Resources Board rejected the approach Ecology proposes and gave the following reasons:

> "… a 303(d) listing alone is not a sufficient basis on which to conclude that a water necessarily lacks assimilative capacity for an impairing pollutant. The listing is only suggestive; it is not determinative. Listing decisions are made based on all existing water quality-related data and readily available information. That information may not reflect water quality throughout the entire water body. It may not reflect seasonal variations. In addition, more recent site-specific ambient data may be available since the original listings." (WRCP Order WQ 2001-06)

NWPPA recommends that Ecology re-write this section in order to allow the facility subject to the general permit the opportunity to have this issue considered on a case-by-case basis and offer information with respect to the status of the receiving waterbody and assimilative capacity. For example, the waterbody may be on the state 303(d) list, but the data to support that listing may not meet the data quality objectives of Ecology's Policy for listing of impaired waters (WQP 1-11). Or, more recent data may have become available.

2. No Existing Legal Requirement for Compliance at Point of Discharge

There is no current federal or state statute, regulation, or adopted guidances that requires compliance at the point of discharge (end-of-pipe) for discharges to impaired waters. There has been "talk" of a federal regulation or guidance, but none has been promulgated. Hence there are no laws, regulations or "available" guidance that requires compliance at the point of discharge instead of at the edge of the mixing zone or after allowance for initial dilution.

This is logical when the structure of the federal Clean Water Act is viewed as a whole.

At the time of the 1972 Amendments to the federal Clean Water Act, there would have been receiving waters that did not meet water quality standards, just as is the case today. During the hearings on the 1972 Amendments, mixing zones were discussed. Should Congress have desired to foreclose the use of mixing zones, it could have done so (in 1972 or since then). Instead, Congress provided for a comprehensive regulatory regime that addresses impaired waters through the TMDL process.

A host of EPA regulations and guidances allow for mixing zones, specifically 40 C.F.R. 122.44(d)(1) (also see attachment for further analysis). Of key interest is that EPA expressly declined to eliminate mixing zones when this section of the federal rules was last amended.

The practical necessity of mixing zones and state discretion to adopt mixing zone rules, such as are currently on the books in Washington, was upheld in the recent Tenth Cicuit case of American Wildlands, et. al. V. EPA (August 2001) A number of cases have recognized the practical necessity of mixing zones, including P.R. Sun Oil Co. v. EPA (1993) and Marathon Oil Co. v. EPA (1987).

NWPPA recommends that Ecology consider the TMDL process as the primary mechanism for bringing a water body into compliance with water quality standards. It is well established that the TMDL process must account for both point source discharges and non-point discharges such as stormwater. To impose a requirement for compliance at the point of discharge in effect circumvents the allocation that might otherwise be established through the TMDL process.

Condition S3E – Mixing Zone Descriptions

NWPPA comments on the question of availability of mixing zones are addressed above. NWPPA comments on S3E raise the concern that this section is drafted such that it will produce questions of interpretation that could be avoided. Generally, it would be better to re-state existing regulatory language instead of paraphrasing.

Examples:

The draft permit states that:

1. *A mixing zone is only applicable when:*

a. The pollutant is not subject to 303(d) listing at the point of discharge.

Comment: See above

b. The receiving waterbody does not have a control plan that would limit available dilution.

Comment: In some contexts, this wording would make no sense. There could be a TMDL which "limits available dilution" but still allows some increment of dilution hence a mixing zone. This is a matter which could be addressed through clear drafting.

d. The mixing zone does not have a reasonable potential to result in a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the waterbody, result in damage to the ecosystem, or adversely affect public health as determined by Ecology.

e. The mixing zone does not create a barrier to the migration or translocation of indigenous organisms to a degree that has the potential to cause damage to the ecosystem.

Comment: While (d) seems a close approximation of a portion of WAC 173-201A-100, (e) is new language that is not in the regulation at all at this point.

NWPPA does not contest that Ecology should address potential to create a barrier to migrating fish. However as a drafting matter, Ecology should adhere to the regulatory language more closely. In this case, Ecology's legitimate concerns are probably covered by (d). If there are individual issues, Ecology has authority to address theses on a case-by-case basis.